BRIEF IN SUPPORT OF PETITION.

The facts are sufficiently stated in the Petition but are set out in detail in the Findings of Fact of the Trial Court, R. 286-300, specifically adopted by the Circuit Court of Appeals in these words: "The facts we take from the Trial Court, but the conclusions upon them must be our own" (R. 327).

Specifications of Error.

The Circuit Court of Appeals erred

1. In holding that the word "social" shall be given an "elusive" or "artificial" meaning, contrary to the Regulations of the Treasury Department and the uniform decisions of all the other circuits and courts of the United States where the question has been presented, with the result that the Law has been rendered indefinite, vague, confused and conflicting.

2. In holding what while the Petitioner was a business luncheon club maintained by business men to meet and discuss their business matters, that that was its predominant purpose and that it had no social activities but was still taxable as a "social club" under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928.

3. In holding that a luncheon club no matter by whom or for what purpose maintained or what type of matters discussed or handled, was necessarily "social" within said Act.

ARGUMENT.

Point I.

There is a direct conflict between the Circuit Court of Appeals in its decision in this case and the decisions of the first, second and third (its own decisions), as to the

construction of Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928.

As already pointed out the court below held that the word "social" as used in said Act was a "term of art" although an "elusive" one and therefore should be given an elusive or artificial meaning, and hence arbitrarily held that any luncheon club, no matter by whom maintained, for what purposes, or what its social activities are, is a "social club" within the taxing Act.

This decision was in direct conflict with the following decisions where it was decided by other Circuit Courts of Appeals that such luncheon clubs when maintained by business men for business purposes were not taxable even though they had incidental social activities.

For example the decision of the Third Circuit below is in conflict with the following decisions:

Squantum Association v. *Page,* 77 F. (2d) 918; C. C. A., 1st Circuit.

Tidwell v. *Anderson,* 72 F. (2d) 684; C. C. A., 2d Circuit.

Union Club of Pittsburgh v. *Heiner,* 99 F. (2d) 259; C. C. A., 3d Circuit.

For the convenience of the Court we quote pertinent extracts from some of the opinions.

This decision is in conflict with this Third Circuit's prior decision in the *Union Club* case, 99 F. (2d) 259; a business luncheon club similar in all respects to the case at bar. The Circuit Court of Appeals said in the *Union Club* case, *supra,*

> "What are the predominant features of the Union Club? Is it social relaxation or business activity supported and paid for by business companies for business purposes? * * *
>
> "* * * Turning then, to the questions involved as above indicated, we find at the outset a business pur-

pose and practice, namely, that this was not a club of individuals who sought membership for social purposes but a Club supported and paid for by business corporations for business purposes * * *.

"* * * The record fails completely to establish that the continued habit of its members and general and established conduct of its membership indicate any other purpose than to set up and maintain a central place where at the noon hour business men could in business hours meet business men for business purposes."

The Court overruled that case, saying

"The learned trial Judge naturally relied for guidance upon the decision of this Court in Union Club of Pittsburgh *v.* Heiner, 99 Fed. (2d) 259 (C. C. A. 3, 1938). This Court as at present constituted does not agree with the view expressed in the majority opinion in that case and it may be regarded as overruled."

A.

This decision is in conflict with the decision of the Court of Claims, *Whitehall Lunch Club* v. *U. S.*, 9 Fed. Supp. 132, which held the club a business luncheon non-taxable and where that Court approved its official Commissioner's findings. We quote from that decision:

"The predominant activity of the club was the serving of lunches to its members and their guests in such manner as to enable them to come into desired contact with others in a business and professional way, and the club could not have existed without this being done, but on the whole neither the social features nor the gymnasium facilities considered separately, or both taken together, existed in a degree to make them anything more than incidental to the predominant activity of the club, as above set forth."

And the decision in *Bankers' Club of America, Inc.*, v. *U. S.*, 37 Fed. (2d) 982, solely a business luncheon club

with no other facilities, which held the club non-taxable and where Judge Booth said:

> "* * * Nevertheless the record herein fails completely to establish that the continued habits of its membership and the general and established conduct of its management indicate any other purpose than to set up and maintain a central meeting place for men of means to have their luncheon and discuss during the noon hour the affairs with which they are concerned. Neither the Taxing Act nor the Regulations of the Bureau discriminate between an imposing organization and one less ornate and attractive. The issue is the purpose of the club, and, if it falls within the class specifically pointed out by the Act and the Regulations as exempt from taxation, we cannot refuse to so hold, especially so when there exists no proof of any probative worth to the contrary.
>
> "The case, it seems to us, comes within the decision of this Court in the following cases: Aldine Club *v.* United States, 65 Ct. Cl. 315, and Chemists' Club *v.* United States, 64 Ct. Cl. 156."

B.

This decision is in conflict with the decision of the Court of Appeals of the First Circuit in *Page* v. *Squantum Assn.*, 77 F. (2d) 918, which only served lunches but was held non-taxable. Judge Bingham said:

> "The District Court (7 F. Supp. 815, 818) found that 'the main purposes and activities of the club were * * * the serving of food, and * * * that the social aspects were merely incidental thereto.' Having found these facts, among others, it ruled that it was not a social club or organization within the meaning of Section 501 of the Revenue Act of 1926 (26 U. S. C. A. Section 872 note) and Section 413 (a) of the Revenue Act of 1928 (26 U. S. C. A. Sec. 873). See Regulations 43, Arts. 35 and 36.

In view of the facts found we think the ruling was correct, and the judgment of the District Court should be affirmed."

C.

This decision is in conflict with the decision of the Court of Appeals of the Second Circuit in *Tidwell* v. *Anderson,* 72 Fed. (2d) 684, a business club involving service of luncheons, where Judge Chase said:

"(1) The test of taxability is not whether a club has any social features at all, but whether or not such activities, viewed, of course, in the light of all the circumstances of its existence, including the declared purpose of the organization as shown by its constitution and by-laws, if their provisions are enforced, are what in fact provide the real reason for its existence and enable it to secure members and retain them. Another way to put the problem is 'whether the social features of the club involved are merely incidental or whether, on the other hand, they are a material purpose of the organization.' Union League Club of Chicago *v.* United States, supra.

"9. The principal meal is luncheon, when it is customary for groups from a single department of the University or professionally occupied on a single subject to sit at the same tables, so as there to discuss or dispose of University matters of mutual concern."

Again, the decision of the Circuit Court of Appeals in the Third Circuit, in this case, is in conflict with its own construction of the Act in the *Union Club of Pittsburgh* v. *Heiner,* in which Judge Buffington said:

"In determining that question (whether the taxpayer was in operation a social club and as such subject to taxation, or was in operation a business luncheon club and therefore not subject to taxation) the weight of authority indicates the test is whether in its actual working business was an incident to social, or social features incidental to business."

D.

Likewise, it is in conflict with the following decisions in other Circuits and other Courts:

The rule laid down by Judge Caffey in the District Court in *Tidwell* v. *Anderson,* 4 F. Supp. 789, states:

> (TO RENDER CLUB DUES TAXABLE ON GROUND CLUB IS SOCIAL CLUB, SOCIAL FEATURES MUST BE MATERIAL PURPOSE OF ITS ORGANIZATION.) "Under foregoing rule, if social features are subordinate and merely incidental to real and primary pursuit of something other than social features, that is, if there be active furtherance of something different from social features, and if that different thing be the predominant purpose of the organization, then the social features are not a material purpose. Although social features may be a purpose, that purpose cannot be treated as material if it be but an unsubstantial portion of the whole set or purposes for which the club is carried on."

The Court of Claims said in the *Army and Navy Club* v. *U. S.,* 53 F. (2d) 277,

> "if the predominant purpose of the organization is not social, and its social activities are merely incidental to the furtherance of this different and predominant purpose, then the Club is not a social one within the law."

And again, in the *Chemists Club* v. *U. S.,* 64 Ct. Cl. 156:

> "Where the predominant purpose of the organization is the accomplishment of something in religion, the arts or business, it is not a social club, notwithstanding it provides incidentally means of social intercourse."

In the *Engineers' Club of Philadelphia* v. *U. S.* (Di. Ct., E. D. Penna., C. C. H. 1937 to Vol. 4, Par. 9478):

> "I cannot, however, agree with the defendant that the question is whether or not a material part of the club *activities* are of a social nature. If that were so, there would be very few clubs which would escape taxation and most of the reported cases would have been differently decided. The question is whether the social features are a material *purpose* of the club. They may be a material part of its activities and still be subordinate and merely incidental to the main purpose. * * * For the purposes of this case I have accepted the Regulations themselves as an authoritative interpretation of the Act and as supplying a fair and reasonable test."

The Circuit Court of Appeals recognized the confused state of the law in these words (we quote from its decision (R. 330):

> "The decisions which have dealt with the application of this statute present a rather confused picture, due perhaps to the necessarily vague character of the concept, for tax purposes, of what is social.",

casting doubt upon a long line of decisions by using these words (R. 330);

> "Some others seem to us to go pretty far in what a group of people must do together in order that their activities be called social."

Citing the following cases, which are fundamentally in conflict with their own:

Page v. *Squantum Assn.*, 77 F. (2d) 918 (C. C. A. 1, 1935), affirming 7 F. Supp. 815 (D. R. I. 1934);
Tidwell v. *Anderson*, 72 F. (2d) 684 (C. C. A. 2, 1934);
Whitehall Lunch Club v. *U. S.*, 9 F. Supp. 132 (Ct. Cl. 1934);
The Cordon v. *U. S.*, 46 F. (2d) 719 (Ct. Cl. 1931);
Bankers' Club of America, Inc., v. *U. S.*, 37 F. (2d) 982 (Ct. Cl. 1930).

It brings into relief the uncertainty and confusion precipitated in the law to cite the predicament of the Trial Judge, Judge Schoonmaker. He had decided the case of the *Union Club of Pittsburgh*. In his opinion, it was a social club, even though its activities consisted in providing luncheons and other facilities for a group of business men. This same Circuit Court of Appeals in the Third Circuit promptly reversed him.

When the Duquesne Club, the case at bar, came before Judge Schoonmaker, acting as he was bound to do, followed that decision and held that the *Duquesne* case, under identical facts, was not a social club and therefore not taxable.

Again, the same Circuit Court of Appeals, on the same facts but on a different conclusion of law, promptly reversed him. It will be difficult to know what rule of law the District Court Judge will follow when a similar case comes before him.

Point II.

The decision of the Circuit Court of Appeals for the Third Circuit in this case has placed a construction upon a Federal statute, to wit, Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928, which is in conflict with its own decisions and that of all the other Circuit Courts of Appeal where the question has been presented, thus rendering the law confused, uncertain and doubtful.

The legal question involved is what construction is to be placed on the words "social club" in Section 501 of the Revenue Act of 1926 as amended by Section 413 of the Revenue Act of 1928. Are the words to be given their "ordinary and natural sense"?

The Circuit Court of Appeals in the instant case held, contrary to all the other Circuits that "the term 'social' "

when used in the Statute imposing a tax necessarily becomes a "term of art, even though an elusive one", and having placed upon the word "social" this fantastic definition, they proceeded to hold that any business luncheon club, even though maintained by business men to further business interests, and with negligible other social activities, was necessarily a "social club" within this "elusive" term of art.

This construction placed upon the word "social" by the Circuit Court of Appeals, we assert, is contrary to the well settled decisions of the Supreme Court, holding that:

> "Language used in tax statutes should be read in the ordinary and natural sense; in the common and usual meaning of the term."
>
> *Helvering* v. *San Joaquin Co.*, 297 U. S. 499;
> *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552;
> *Reinecke* v. *Smith*, 289 U. S. 172.

The error committed by the Third Circuit is that it has gone contrary to the well settled rule of this Court that:

> "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning."
>
> *Caminetti* v. *United States*, 242 U. S. 470, 490.

Point III.

The decision of the Circuit Court of Appeals for the Third Circuit in this case is in conflict with the regulations issued by the Commissioner under the statute and the settled practice of the Bureau.

The Statute taxing "fees of any social, athletic or sporting club or organization" came into the law in 1917 and has been repeatedly reenacted in the subsequent Revenue Acts of 1918, 1921, 1924, 1926 and 1928, in the same words.

Under the original Act and subsequent Acts, the Treasury issued Regulations 43 construing it. In these it undertook (Articles 35 and 36, Appendix A) to define a social club or organization, and was careful to point out that not all clubs having incidental social activities came within the Act. These original Regulations stated that if the Club had a predominant non-social purpose, "such as, for example, religion, arts, or business" the mere existence of social features "subordinate and merely incidental to the active furtherance of a different and predominant purpose did not render it taxable under the Act".

These Regulations make it plain that social features which are "subordinate and merely incidental to the active furtherance of a different and predominant purpose" (Art. 36) (Appendix A) do not render a non-social club taxable. It must be established and shown either that the social features are the predominant purpose of the club, that is, that the social features are "so materially interwoven into the entire fabric of the club that without them the club could not exist", and that they became a material purpose (*Transportation Club of San Francisco*, Ct. Cl., 17 Fed. Supp. 201).

Since these Regulations were adopted, the Act has been repeatedly re-enacted by Congress, without change of words.

Under settled decisions this is the legislative adoption of the Treasury Department's contruction of the Act, and gives to the Regulations the force and effect of Statutes:

Brewster v. *Gage*, 280 U. S. 327, 337;
National Lead Co. v. *U. S.*, 252 U. S. 140, 147;
U. S. v. *Bailey*, 9 Pet. 238, 256;
Town Club of St. Louis, 68 F. (2d) 620;
Provost, et al. v. *U. S.*, 269 U. S. 443;
U. S. v. *Falk & Bro.*, 204 U. S. 143;
U. S. v. *Hermanos*, 209 U. S. 337.

Conclusion.

Wherefore, your petitioner respectfully presents that this case is one of gravity, importance, and of general public interest, and prays that a Writ of Certiorari be issued out of and under the seal of this court, directed to the Circuit Court of Appeals, Third Circuit, commanding said Court to certify and send to this court on the date to be designated in said Writ, full and complete record of all proceedings in said Circuit Court of Appeals in this case, to the end that said case may be reviewed and determined by this court, as provided by law.

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